No. 43075-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Tanya Quinata,

Appellant.

Clark County Superior Court Cause No. 10-1-01713-5

The Honorable Judge John Wulle

Appellant's Reply Brief

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I. RESPONDENT IMPLICITLY CONCEDES THAT RCW 9A.36.011 WAS ENACTED IN VIOLATION OF WASH. CONST. ART. II, § 19.

In Washington, a bill may embrace only one subject, and that subject must be expressed in the bill's title. Wash. Const. art. II, § 19. These two rules prevent logrolling and provide notice of a bill's contents. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 207, 11 P.3d 762 (2000) *opinion corrected,* 27 P.3d 608 (2001). Provisions that are not fairly within a restrictive title[1] are not given force. *Id.,* at 210.

RCW 9A.36.011, which defines and criminalizes first-degree assault, was enacted by Laws of 1986, Chapter 257. That bill was titled "AN ACT Relating to the sentencing of adult felons..." Laws of 1986, Ch. 257 § 4. This title is restrictive. *Amalgamated Transit Union,* 142 Wn.2d at 210*; see also Broadaway*, 133 Wn.2d at 127. It does not fairly

[1] Restrictive titles are "narrow, as opposed to broad;" the label applies whenever "'a particular part or branch of a subject is carved out and selected as the subject of the legislation.'" *State v. Broadaway*, 133 Wn.2d 118, 127, 942 P.2d 363 (1997) (quoting *Gruen v. State Tax Comm'n,* 35 Wn.2d 1, 23, 211 P.2d 651 (1949)), *overruled on other grounds by State ex rel. Washington State Finance Commission v. Martin*, 62 Wn.2d 645, 384 P.2d 833 (1963)). General titles are "broad rather than narrow," they "may be comprehensive and generic rather than specific." *Amalgamated Transit Union,* at 207-208. A statute enacted under a general title requires only "rational unity between the general subject and the incidental subjects." *Amalgamated Transit Union,* at 207-208. Examples of general titles include "An Act relating to violence prevention," "An Act relating to tort actions." *Amalgamated Transit Union,* at 207-208 (providing examples).

describe the provision defining first-degree assault: the sentencing of adult felons does not encompass the definition of crimes such as assault.[2]

Respondent does not argue that the 1986 bill complied with art. II, § 19. *See* Brief of Respondent, pp. 6-7.[3] Respondent's silence on this point may be treated as a concession. *See In re Pullman,* 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

Instead, Respondent erroneously suggests that the 1997 amendments cured problems created by the 1986 bill. Without citation to authority, Respondent incorrectly asserts that the title includes the phrase "amending… RCW 70.24" for purposes of art. II, § 19. This is incorrect.

It has long been the rule that "mere reference to a section in the title of an act does not state a subject." *Patrice v. Murphy*, 136 Wn.2d 845, 853, 966 P.2d 1271 (1998) (internal quotation marks and citations omitted). This is so even if the reference follows words such as "amending," "adding new sections to," or "repealing." *Id.; see also Fray*

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[2] Although portions of the bill addressed the sentencing of adult felons, many provisions addressed other topics. *See, e.g.,* Laws of 1986, Ch. 257 §§ 2-14, 16, 31-33. The bill epitomizes the practice of logrolling.

[3] Respondent "disagrees" that the title is restrictive, but presents no argument on the issue, and does not suggest that the bill addressed a single subject that was expressed in the bill's title. Brief of Respondent, p. 6. Even if the title is considered general, there is no "rational unity" between the sentencing of adult felons and the substantive definition of crimes such as assault. Accordingly, the bill violated art. II, § 19 even if the title were considered general as Respondent suggests. *Amalgamated Transit Union,* 142 Wn.2d at 210

v. Spokane Cnty., 134 Wn.2d 637, 651-555, 952 P.2d 601 (1998); *State v. Superior Court of King Cnty.*, 28 Wash. 317, 325, 68 P. 957 (1902) ("To say that mere reference to a numbered section embodies the idea of a theme, proposition, or discourse, it seems to us, is not sustained by the ordinary understanding of those terms.")

The 1997 bill amending RCW 9A.36.011 would have cured the defect if it had been "properly titled legislation." *Morin v. Harrell*, 161 Wn.2d 226, 228, 164 P.3d 495 (2007). But it was not "properly titled." *Id.* Aside from Respondent's erroneous argument about the numerical reference in the title, Respondent does not suggest that the 1997 bill was properly titled. Brief of Respondent, pp. 6-7.

Nor could Respondent do so: the 1997 bill addressed two different subjects, and thus violated the single-subject rule. Laws of 1997, Ch. 196. A legislator opposed to criminal prosecutions for people with HIV (*see* §§ 1-4) might nonetheless have voted to approve the bill because s/he favored the civil detention of infected persons who engage in risky conduct and the appropriate dissemination of court-ordered HIV test results (*see* §§ 5-6). This is the very definition of logrolling. *Amalgamated Transit Union,* 142 Wn.2d at 207.

Furthermore, the 1997 bill does not pass the subject-in-title test. The bill's title—"AN ACT Relating to crimes"—did not provide notice

that the bill addressed civil detention of infected persons or dissemination of records of HIV testing. Laws of 1997, Ch. 196, §§ 5-6.

The 1997 bill did not properly cure defects in the 1986 bill. Accordingly, RCW 9A.36.011 is void. *See State ex rel. Washington Toll Bridge Auth. v. Yelle*, 32 Wn.2d 13, 24, 200 P.2d 467 (1948) ("[W]hen laws are enacted in violation of [art. II, § 19], the courts will not hesitate to declare them void.") Ms. Quinata's conviction must be vacated and the charge dismissed with prejudice. *Id.*

II. THE ADMISSION OF TESTIMONIAL HEARSAY VIOLATED MS. QUINATA'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONTATION.

A. A violation of the right to confront witnesses may be raised for the first time on review if it is a manifest error affecting a constitutional right.

As with any manifest error affecting a constitutional right, a confrontation error may be raised for the first time on review pursuant to RAP 2.5(a)(3). Respondent erroneously contends otherwise. Brief of Respondent, pp. 9-12 (citing, *inter alia*, *State v. O'Cain*, 169 Wn. App. 228, 279 P.3d 926 (2012) and *State v. Fraser*, 170 Wn. App. 13, 282 P.3d 152 (2012) *review denied,* 176 Wn.2d 1022, 297 P.3d 708 (2013)).

The two cases cited by Respondent – *O'Cain* and *Fraser*—suggest that a confrontation clause violation is *always* waived unless asserted at

trial. *O'Cain*, 169 Wn. App. at 238; *Fraser*, 170 Wn. App. at 25-26. In *O'Cain*, Division I held that RAP 2.5(a)(3) does not apply to confrontation errors. *O'Cain*, 169 Wn. App. at 248. In *Fraser,* Division I retreated from this bold statement, acknowledging that RAP 2.5(a)(3) might permit review of a manifest error affecting the right to confrontation. *Fraser*, 170 Wn. App. at 26-27 ("Arguably, RAP 2.5(a) is a procedural rule by which Washington State allows defendants to raise confrontation clause objections for the first time on appeal if they can show a manifest error.")

If Washington didn't have a rule like RAP 2.5(a)(3), Ms. Quinata's failure to raise a confrontation objection at trial would be fatal to her appellate argument. But the scope of review in Washington appellate courts is governed by the Rules of Appellate Procedure. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 327, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) ("States are free to adopt procedural rules governing objections.")[4]

[4] If the scope of review were controlled by federal law, appellate litigants could take advantage of the federal "plain error" rule, under which even non-constitutional errors can be raised for the first time on review. *See, e.g., United States v. Trujillo-Terrazas*, 405 F.3d 814, 817 (10th Cir. 2005).

Washington could adopt rules precluding review of any issue not raised in the trial court; it has chosen not to do so.[5] Review is available here under RAP 2.5(a)(3).

This is not a case where the record suggests defense counsel "made a deliberate decision not to litigate this issue with the trial court." *State v. Hayes*, 165 Wn. App. 507, 520, 265 P.3d 982 (2011) *review denied,* 176 Wn.2d 1020, 297 P.3d 708 (2013). Instead, defense counsel raised a hearsay objection to the proffered testimony, but neglected to add a confrontation objection. RP 300-318. This record does not suggest that the error was invited.

Under RAP 2.5(a)(3), an error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008). Respondent has, in essence, conceded that any error prejudiced Ms. Quinata, given the absence of in-court testimony from Mr. Kama. Brief of Respondent, pp. 12-13 ("It is axiomatic that if the victim's statements to his psychiatrist are deemed testimonial, and if this Court agrees that Quinata should be permitted to

[5] A failure to object will generally deprive the trial court of the opportunity to correct an error. This is true of any manifest error affecting a constitutional right, and not merely confrontation errors that meet this standard.

raise this error for the first time on appeal, the admission of the statement was error. The victim did not appear at trial. There was no prior opportunity for cross-examination.") The error is manifest and can be raised for the first time on review. *Id.;* RAP 2.5(a)(3).

Kama's statement was testimonial hearsay. When it was taken, he'd been "waiting to tell his side of the story." RP 307, 310. A reasonable person in his circumstances would have understood that the statement—that Ms. Quinata had intentionally stabbed him during an argument—would be available for later use at trial. RP 300-318; *see Crawford v. Washington*, 541 U.S. 36, 51-52, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Furthermore, Patty Morgan from "psych services" likely understood that her report—a summary of Mr. Kama's statement—would be available for use in a criminal prosecution. The same is true of the unknown person who transcribed Ms. Morgan's dictation.[6] RP 313. Respondent erroneously contends that Kama's statements were nontestimonial. Brief of Respondent, pp. 13-16 (citing *State v. Hurtado,* _Wn. App._, 294 P.3d 838, 843 (2013); *State v. Sandoval,* 137 Wn. App.

[6] Respondent describes this person as a "conduit" rather than a declarant. Brief of Respondent, pp. 15-16. This is incorrect; the transcriptionist functions in the same manner as an interpreter. *See, e.g., State v. Morales*, 173 Wn.2d 560, 576, 269 P.3d 263 (2012), *as corrected on denial of reconsideration* (Mar. 7, 2012).

532, 538, 154 P.3d 271 (2007); *State v. Moses,* 129 Wn. App. 718, 729-30, 119 P.3d 906, *review denied,* 157 Wn.2d 1006 (2006)).

These authorities weigh in favor of reversing Ms. Quinata's conviction. All three cases suggest that the declarant's motivation is critical to the determination. In each case, the court concluded that a statement is testimonial unless the speaker intends that it be used for purpose of diagnosis and treatment, and has no expectation that the statements could be used for prosecution. *Hurtado*, 173 Wn. App. at 600; *Sandoval*, 137 Wn. App. at 537; *Moses*, 129 Wn. App. at 728-730.

Here, Kama had been unable to speak for several days. When he was finally extubated he said he'd been "waiting to tell his side of the story." RP 307, 310. Because he knew that he was not suicidal, his statements were not made for purpose of diagnosis or treatment. Furthermore, it is highly likely that he understood any statements would be used at a subsequent prosecution, simply because of the nature of the statements. A reasonable person with a serious knife wound cannot help but understand that an accusation implicating another person in the infliction of the wound would be available for use during a criminal prosecution.[7]

[7] This latter point also applies to Ms. Morgan and to the transcriptionist, as noted above.

For these reasons, the statements were testimonial hearsay. They should have played no part in Ms. Quinata's conviction, absent proof of unavailability and a prior opportunity for cross examination. *Crawford*, at 541 U.S. at 52. Her conviction must be reversed and her case remanded with instructions to exclude Kama's statements. *Id.*

B. Morgan's report was not admissible under any purported exception for expert testimony based on reports from non-testifying individuals.

Respondent does not argue in favor of admissibility under ER 703. Accordingly, Ms. Quinata rests on the argument set forth in Appellant's Opening Brief.

III. THE TRIAL COURT VIOLATED ER 802 BY ADMITTING HEARSAY THAT DID NOT FIT WITHIN AN EXCEPTION TO THE RULE AGAINST HEARSAY.

Ms. Quinata rests on the argument set forth in Appellant's Opening Brief.

IV. THE PROSECUTOR COMMITTED MISCONDUCT THAT WAS FLAGRANT AND ILL-INTENTIONED.

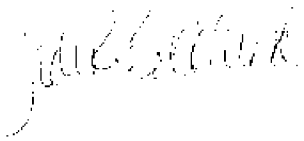
Ms. Quinata rests on the argument set forth in Appellant's Opening Brief.

CONCLUSION

Ms. Quinata's conviction must be reversed. The case must be dismissed because she was charged under a statute that was unconstitutionally enacted in violation of art. II, § 19. In the alternative, the case must be remanded because her confrontation rights were violated, the trial court erroneously admitted hearsay, and the prosecutor committed prejudicial misconduct.

Respectfully submitted on June 24, 2013.

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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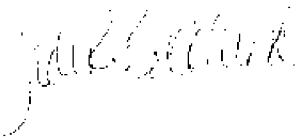
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 24, 2013.



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